

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

IN RE:)	
)	
JEFFERSON COUNTY, ALABAMA,)	
)	CASE NO.: 11-5736-TBB-9
Debtor.)	
)	CHAPTER 9
)	

**MOTION OF THE TRUSTEE FOR ORDER GRANTING RELIEF FROM
THE AUTOMATIC STAY, TO THE EXTENT IT APPLIES, TO PERMIT
ACCELERATION OF THE JEFFERSON COUNTY SEWER WARRANTS**

The Bank of New York Mellon, in its capacity as Indenture Trustee (the “Trustee”) for the special revenue sewer warrants issued by Jefferson County, Alabama (the “County”) in the original principal amount of approximately \$3.6 billion¹ pursuant to the terms of that certain Trust Indenture, dated February 1, 1997, as amended and supplemented from time to time (the “Indenture”),² respectfully moves this Court for relief from the automatic stay to the extent the stay applies, *nunc pro tunc* as of February 1, 2013, to permit the Trustee, in its discretion, to

¹ The special revenue sewer warrants issued by the County currently outstanding are the following series and original principal amounts: \$211,040,000 Sewer Revenue Refunding Warrants Series 1997-A; \$275,000,000 Sewer Revenue Capital Improvement Warrant Series 2001-A; \$110,000,000 Sewer Revenue Capital Improvement Warrants Series 2002-A; \$839,500,000 Sewer Revenue Refunding Warrants Series 2002-C; \$41,820,000 Sewer Revenue Refunding Warrant Series 2003-A; \$1,155,765,000 Sewer Revenue Refunding Warrants Series 2003-B; and \$1,052,025,000 Sewer Revenue Refunding Warrants 2003-C.

² Capitalized terms shall have the meaning given them in the Indenture unless otherwise set forth herein. A true and correct copy of the original Trust Indenture, dated February 1, 1997, is attached hereto as Exhibit A (the “Original Indenture”). Unless otherwise indicated, references to sections of the Indenture will refer to the Original Indenture. The Indenture refers to the Warrants as “Parity Securities” and to the holders of Warrants as “Parity Securityholders.”

accelerate and declare immediately due and payable, effective as of February 1, 2013, the Parity Securities, other than the \$110,000,000 Sewer Revenue Capital Improvement Warrants Series 2002-A (CUSIP No. 472682JW4) (the “Series 2002-A Parity Securities”), which are already due and owing, and (ii) the 2003-B-8 Sewer Warrants (the “Series 2003-B-8 Parity Securities”), (CUSIP Nos. 472682MP5, 472682MQ3, 472682MR1, and 472682MS9), the 2003-C-9 Sewer Warrants (the “Series 2003-C-9 Parity Securities”) (CUSIP No. 472682NJ8), and Series 2003-C-10 Sewer Warrants (the “Series 2003-C-10 Parity Securities”) (CUSIP No. 472682NK5) (the Series 2003-B-8 Parity Securities, Series 2003-C-9 Parity Securities, and Series 2003-C-10 Parity Securities are collectively referred to as the “Assured-Insured Parity Securities”), unless and until their insurer, Assured Guaranty Municipal Corp., formerly known as Financial Security Assurance Inc. (“Assured”), consents to the acceleration of Assured-Insured Parity Securities in accordance with the terms of the Indenture. The Trustee seeks relief pursuant to sections 362(d)(1) and 922(b) of Title 11 of the United States Code (the “Bankruptcy Code”), Rule 4001 of the Federal Rules of Bankruptcy Procedure, and Local Rule 4001-1.

PRELIMINARY STATEMENT

The Trustee seeks relief to, in its discretion, accelerate the amount due on certain Parity Securities. As of the filing of this motion, the balance of moneys in the Debt Service Fund and moneys available under the various municipal bond insurance debt service reserve policies (the “Reserve Policies”) for such purpose in the Reserve Fund are insufficient to allow the Trustee to pay by operation of section 13.3(a) of the Indenture, both (i) the approximately \$792.3 million in principal which is already due and owing with respect to certain Warrants (the “Bank Warrants”) called for redemption pursuant to the terms of the Indenture and the Standby Warrant Purchase Agreements executed by the County and various Liquidity Providers in connection with the

issuance of certain of the Parity Securities outstanding under the Indenture, and (ii) the principal payments which have come due on February 1, 2013, in the approximate amount of \$18.2 million with respect to other Parity Securities coming due at maturity or as a result of mandatory sinking fund redemptions.³

Prior to February 1, 2013, as the County, the Bond Insurers⁴ and holders of Bank Warrants (the “Bank Warrantholders”) engaged in discussions regarding possible consensual resolutions of the Events of Default, all Bank Warrantholders and the Bond Insurers consented to the Trustee making regularly scheduled payments of principal coming due at maturity or by mandatory sinking fund redemption on Parity Securities other than Bank Warrants in the ordinary course as provided for in section 13.3(a) of the Indenture as if (a) the existing principal payment defaults had not occurred with respect to the Bank Warrants, and (b) as if there were no required mandatory redemption payments presently due on the Bank Warrants. In 2010 and 2011, the County also joined in these consents. As a result of having obtained these consents, prior to February 1, 2013, the Trustee had sufficient moneys in the Debt Service Fund to make, and was making, the regularly scheduled payments of interest and principal coming due at maturity or by mandatory sinking fund redemption on Parity Securities other than Bank Warrants in the ordinary course as provided for in section 13.3(a) of the Indenture.

As of February 1, 2013, certain Bank Warrantholders have refused to consent, at this time, to the Trustee’s application of funds to the regularly scheduled payments of principal on Parity Securities coming due at maturity or by mandatory sinking fund redemption in February

³ Additional principal payments of \$11,415,000 are coming due at maturity or as a result of mandatory sinking fund redemptions throughout the balance of February and into early March, 2013.

⁴ The “Bond Insurers” shall mean Assured, Syncora Guarantee Inc., and Financial Guaranty Insurance Company.

and early March 2013 without making payments of the overdue principal on the Bank Warrants. As a result, the Trustee did not have sufficient moneys on deposit in the Debt Service Fund or available for such purpose in the Reserve Fund to pay the principal already due and owing with respect to the Bank Warrants and the scheduled payments of principal for other Parity Securities coming due at maturity or by regularly scheduled sinking fund redemption on February 1, 2013.

On February 1, 2013, the Trustee provided the Parity Securityholders with notice that it was suspending payments. Under these circumstances, the Trustee believes it is both equitable and in the best interest of the Parity Securityholders that the Trustee have the discretion to accelerate the Parity Securities other than (i) the Series 2002-A Parity Securities (unless consented to by its insurer Financial Guaranty Insurance Company (“FGIC”))⁵, and (ii) the Assured-Insured Parity Securities,⁶ unless and until their insurer Assured consents to the acceleration of the Assured-Insured Parity Securities in accordance with the terms of the Indenture.

⁵ Section 6.3(i) of the Fourth Supplemental Indenture provides that so long as FGIC has not failed to comply with its payment obligations under the Series 2002-A Insurance Policy, the Trustee shall not accelerate the maturity of the Series 2002-A Parity Securities without the prior written consent of FGIC. The Series 2002-A Parity Securities are Bank Warrants owned by FGIC and are already due and payable. A true and correct copy of the Fourth Supplemental Indenture is attached as Exhibit B.

⁶ Section 9.7(c) of the Ninth Supplemental Indenture provides that the maturity of the Series 2003-B-8 Parity Securities shall not be accelerated without the consent of Assured (sections 9.6 and 9.7 of the Ninth Supplemental Indenture have a typographical error which references incorrectly the Series 2003-B-8 Parity Securities insured by Assured as “Series 2002-B-8 Warrants”). A true and correct copy of the Ninth Supplemental Indenture is attached as Exhibit C. Section 9.5(c) of the Tenth Supplemental Indenture provides that the maturity of the Series 2003-C-9 and Series 2003-C-10 Parity Securities shall not be accelerated without the consent of Assured. A true and correct copy of the Tenth Supplemental Indenture is attached as Exhibit D.

Section 13.3(b) of the Indenture provides in relevant part that if the principal of all the Parity Securities shall have become or been declared due and payable, all such moneys are to be applied as follows:

First. To the payment of principal and interest then due and unpaid upon the Parity Securities, with interest on overdue principal and on overdue interest, without preference or priority of principal over interest or interest over principal, or of any installment of interest over any other installment of interest, or of any Parity Security over any other Parity Security, in proportion to the amounts for both principal and interest due respectively to the persons entitled thereto, without discrimination or privilege among such persons

Under the distribution formula provided for in Section 13.3(b) of the Indenture, the holders of all Parity Securities secured thereby will share pro rata in the collateral as it is distributed by the Trustee.

Simultaneously with the filing of this motion for relief from stay the Trustee filed a complaint for declaratory judgment. The subject matter of the complaint for declaratory judgment relates to (i) whether the Trustee has authority to accelerate any of the Parity Securities absent the consent of Assured to the acceleration of the Assured-Insured Parity Securities, (ii) the effect of acceleration on certain rights and obligations of the County, Trustee, Parity Securityholders, and Bond Insurers (including the proper application of funds under the terms of the Indenture), and (iii) the rights and obligations of the Bond Insurers under the Municipal Bond Insurance Policies (“Wrap Policies”) and Municipal Bond Debt Service Reserve Insurance Policies (“Reserve Policies”, and together with the Wrap Policies, the “Bond Insurance Policies”).⁷

⁷ The Trustee seeks a determination of the following disputes in its declaratory judgment action: (a) whether the Trustee has the authority to accelerate Parity Securities, other than the Assured-Insured Parity Securities, if their insurer Assured has not consented to the acceleration of those warrants in accordance with the terms of the Indenture; (b) whether after any acceleration, the

In support of this Motion, the Trustee states as follows:

PROCEDURAL POSTURE

1. On November 9, 2011, the County filed its voluntary petition for relief under chapter 9 of the Bankruptcy Code.
2. The County is a political subdivision of the State of Alabama.
3. On March 4, 2012, this Court entered the order for relief in the County's case [Dkt. No. 778], confirming the County's eligibility to be a debtor under chapter 9 of the Bankruptcy Code.

JURISDICTION AND VENUE

4. This Court has jurisdiction to consider whether the automatic stay is applicable to the Trustee's acceleration of the Parity Securities and, if so, whether the Trustee is entitled to relief from the automatic stay of sections 362(d) and 922(a) of the Bankruptcy Code, pursuant to 28 U.S.C. §§ 157 and 1334.⁸

proceeds of draws upon Reserve Policies should be applied pursuant to section 13.3(b) of the Indenture among all Parity Securityholders with amounts then due and owing which are secured by the Reserve Fund, pro rata, without preference or priority of principal over interest or alternatively, despite the terms of section 13.3(b) of the Indenture, only to Holders of specific Parity Securities secured by the Reserve Fund with respect to interest then coming due on the stated date for the payment of interest and/or principal then coming due on their stated maturity date or mandatory sinking fund redemption date (without giving effect to any acceleration) that have come Due for Payment (as defined in the respective policies); (c) whether upon the failure of a Bond Insurer to honor a draw on its Reserve Policy, the Trustee is entitled under the Indenture to make subsequent draws on the other available Reserve Policies to cover the amount unpaid by the defaulting insurer before drawing upon the applicable Wrap Policy; (d) whether reimbursement of amounts paid by the Bond Insurers on account of draws upon the Reserve Policies is subordinate to, or *pari passu* with, the payment of the Parity Securities; and (e) whether Syncora's obligations to honor draws upon its Reserve Policy and its Wrap Policies continue after all or certain of the Parity Securities have been accelerated and declared immediately due and payable.

⁸ Nothing herein is intended to waive any claims or arguments raised in the Expedited Motion of Indenture Trustee For Jefferson County's Sewer Warrants for (A) the Court to Abstain From

5. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(G).
6. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND

7. Between 1997 and 2003, the County issued Parity Securities in the original aggregate principal amount of \$3.6 billion pursuant to Alabama Code § 11-28-1 *et. seq.* to fund improvements to the County's sewer system.

8. The Parity Securities are governed by the Indenture.

9. As of the Petition Date, the County owed the Parity Securityholders approximately \$3.2 billion under the terms of the Indenture, the Parity Securities, the Alabama Constitution, and Alabama statutes, and it remains indebted in that approximate amount today.

10. Section 13.1(a) of the Indenture provides that the failure to pay the principal of or the interest on any Parity Security as and when the same shall become due is an Event of Default.

11. On September 22, 2010, the Circuit Court of Jefferson County, Alabama, in the case styled *The Bank of New York Mellon, as Indenture Trustee vs. Jefferson County, Alabama, et. al.*, Case No. CV-2009-02318, determined that the County had defaulted on its obligations owed to the Trustee and the Parity Securityholders by its failure to make payments when due.

Taking Any Action to Interfere with the Receivership Case and the Receiver's Operation and Administration of Sewer System In Accordance With the Receivership Order, or (B) For Relief From the Automatic Stay to the Extent Necessary to Allow Receiver to Continue to Operate and Administer the Sewer System Under the Receivership Order, and (C) Request For Expedited Hearing (the "Trustee's Stay Motion") [Dkt. Nos. 53 and 55] or in connection with the appeal of the order and memorandum opinion concerning the Trustee's Stay Motion entered on January 6, 2012 [Dkt. Nos. 508 and 509], and all such claims and arguments are hereby reserved. This motion is based upon and focuses on facts which have developed since the Trustee's Stay Motion was filed in 2011.

12. The County has failed to comply with terms of the Indenture creating past and continuing Events of Default, as that term is defined in section 13.1(a) of the Indenture. Separate Events of Default have occurred and are continuing under section 13.1(a) of the Indenture as a result of the County's failure to make approximately \$792.3 million in rapidly amortizing principal payments due beginning on June 2, 2008, and continuing through April 1, 2012, with respect to the Bank Warrants called for redemption pursuant to the terms of the Indenture and Standby Warrant Purchase Agreements executed by the County and various liquidity banks.

13. Section 13.2(a) of the Indenture grants the Trustee the power to accelerate and declare the Parity Securities to be immediately due and payable upon the failure of the County: (a) to pay the principal of, or interest or premium (if any) on any Parity Securities when due (whether at maturity, by redemption, acceleration, or otherwise); or (b) upon the occurrence of any other Event of Default.

GROUND FOR THE RELIEF REQUESTED

14. February 1, 2013, is a scheduled payment date for certain of the Parity Securities.

15. Certain Bank Warrantholders have refused to consent, at this time, to the Trustee's application of funds to the regularly scheduled payments of principal on Parity Securities coming due at maturity or by mandatory sinking fund redemption in February and early March 2013 without making payments of the overdue principal on the Bank Warrants. The balance of moneys in the Debt Service Fund and available for such purpose in the Reserve Fund is not sufficient to allow the Trustee to pay by operation of section 13.3(a) of the Indenture, both (i) the principal which is already due and owing with respect to the Bank Warrants, and (ii) the

principal which has or is to come due with respect to the other Parity Securities in February and early March 2013.

16. Under these circumstances, the Trustee believes it is both equitable and in the best interest of the Parity Securityholders that the Trustee have the discretion to accelerate the Parity Securities other than the Assured-Insured Parity Securities (unless and until Assured consents) and the Series 2002-A Parity Securities (unless and until FGIC consents).

17. The Trustee believes that acceleration of the Parity Securities is not stayed due to the operation of section 922(d) of the Bankruptcy Code. To the extent the Court finds that the stay does apply, the Trustee seeks an order modifying the stay to permit the Trustee, in its discretion, to accelerate and declare immediately due and payable the Parity Securities, *nunc pro tunc*, as of February 1, 2013, other than Series 2002-A Parity Securities (unless and until FGIC consents) and the Assured-Insured Parity Securities (unless and until Assured consents).

18. Since disagreements have arisen among the Trustee and Bond Insurers concerning the proper interpretation and operation of the terms of the Indenture and certain bond insurance policies upon acceleration, the Trustee is seeking the Court's assistance in resolving certain issues. The Trustee has filed a declaratory judgment action in conjunction with this motion for relief to address these issues.

19. Upon motion of a party in interest, and after notice and a hearing, a bankruptcy court shall grant relief from the automatic stay provided under section 362(a) and 922(a) of the Bankruptcy Code, such as by terminating, annulling, modifying, or conditioning the stay, "for cause, including lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1); *see also In re Indian Palms Assocs. Ltd. v. Cal. Fed. Bank*, 61 F.3d 197, 208 (3d Cir. 1995) (observing that the language of section 362(d) is mandatory as it provides

that “the court shall grant relief”). The party that opposes relief from the automatic stay has the burden of proof on issues other than the debtor’s equity in property. *See* 11 U.S.C. § 362(g); *see also O’Quinn Family P’ship v. 440 Kings Way, LLC (In re 440 Kings Way, LLC)*, 430 B.R. 915, 920 (Bankr. S.D. Ga. 2007) (“When a party in interest alleges ‘for cause’ grounds for relief from stay, the debtor bears the burden of proof by a preponderance of the evidence that ‘cause’ does not exist.”). The Bankruptcy Code does not specify what constitutes “cause.” *Izzarelli v Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992); *see also In re Wilson*, 116 F.3d 87, 90 (3d Cir. 1997). Accordingly, “cause” to warrant lifting the stay is an intentionally broad and flexible concept that permits a bankruptcy court, as a court of equity, to “address specific exigencies on a case-by-case basis.” *Brown v. Chestnut (In re Chestnut)*, 422 F.3d 298, 303 (5th Cir. 2005); *In re Sentry Park, Ltd.*, 87 B.R. 427, 430 (Bankr. W.D. Tex. 1988).

20. The Trustee believes that because its right to accelerate the Parity Securities relates directly to the payment of pledged special revenues, section 922(d) of the Bankruptcy Code exempts the Trustee’s right to accelerate from the coverage of the automatic stay. The Court has previously held that the automatic stay does not apply with respect to the Trustee’s rights to distribute net System Revenues. The Trustee has during the pendency of this case been making distributions of net System Revenues deposited in the Debt Service Fund to Parity Securityholders. The acceleration of the Parity Securities at the discretion of the Trustee is consistent with the Court’s previous ruling. To the extent the Court finds that the stay does apply, the Trustee further asserts that ample cause exists to modify the stay to permit the Trustee to, in its discretion, accelerate and declare immediately due and payable the Parity Securities other than the Assured-Insured Parity Securities (unless and until Assured consents)

and the Series 2002-A Parity Securities (unless and until FGIC consents). The acceleration of the Parity Securities other than the Assured-Insured Parity Securities (unless and until Assured consents) and the Series 2002-A Parity Securities (unless and until FGIC consents) will allow the Trustee to protect the interests of Parity Securityholders when it distributes payments under the Indenture. It is undisputed that the County has failed to pay principal and interest when due, entitling the Trustee to accelerate and declare Parity Securities immediately due and payable.

21. Further, under the distribution formula provided for in section 13.3(b) of the Indenture, the holders of Parity Securities which have been accelerated and are secured thereby will share pro rata in the collateral as it is distributed by the Trustee without preference or priority of principal over interest.

WHEREFORE, premises considered, the Trustee respectfully requests that the Court enter an order:

(i) holding that the automatic stay does not prevent the Trustee from accelerating the Parity Securities under section 922(d) of the Bankruptcy Code, or in the alternative;

(ii) modifying the automatic stay to permit the Trustee, in its discretion, to accelerate and declare immediately due and payable, *nunc pro tunc*, as of, February 1, 2013, all the Parity Securities, other than the Assured-Insured Parity Securities (unless and until Assured consents to this acceleration) and the Series 2002-A Parity Securities (unless and until FGIC consents to this acceleration);

(iii) determining that the provisions of Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure shall not apply so that the Trustee shall be entitled to immediate relief; and

(iv) granting such other and further relief as is just and equitable.

Respectfully submitted on this 6th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed and served by the Court's electronic case filing and noticing system to all parties registered to receive electronic notices in this matter and via email or via first class mail as stated below to the following, this 6th day of February, 2013.

PARTIES SERVED VIA E-MAIL

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